
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REPLY TO
) PROSECUTION RESPONSE TO **D21**
) (ARTICLE 10 UCMJ)
)
)
) 27 October 2004
)

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D21, be granted.

3. Facts:

a. The Chief Prosecutor in his Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, (attached) and cited by the Prosecution conditioned Defense Counsel access to Mr. Hamdan to "so long as we are engaged in pretrial negotiations." By so limiting Defense Counsel's access to Mr. Hamdan, the Chief Prosecutor clearly envisioned representation for the limited purpose of negotiating a pre-trial agreement.

b. The Prosecution states in b) that the February Legal Advisor Letter denying the applicability of Article 10 of the UCMJ gave a reason: Mr. Hamdan is being held as "an unlawful combatant (a basis unrelated to military commissions)". The claim that Mr. Hamdan's status is "unrelated" to commissions is flat out wrong, as the prosecutor's own memoranda make clear. See, e.g., Prosecution's Response to D20, Lack of Legislative Authority, at 4 (stating that commissions may punish "unlawful belligerents"); id. (quoting *Hamdi*'s language that punishment of "unlawful combatants" is appropriate); id. At 7 (discussing the "power to bring unlawful enemy combatants to justice"); and numerous other places in its Prosecution motions.

c. The Defense does not disagree that CDR XXXX indicated that the order of cases was not up to him. The Defense, however, clearly remembers CDR XXXX stating that Mr. Hamdan was going to go to the back of the pack. CDR XXXX words proved prophetic, as although Mr. Hamdan received the second Target letter and was the only detainee to demand a speedy trial, he was in fact the last detainee charged.

4. Law and Discussion.

1. a. The UCMJ Applies to Hamdan.

The Prosecution argues that the UCMJ does not apply in this case. Yet the cases they cite, *In re Yamashita*, 327 U.S. 1 (1946), and *Madsen v. Kinsella*, 343 U.S. 341 (1952), simply do not speak to the applicability of current UCMJ procedures to the trial by military commission